# Adapting labour law and social security to the needs of the "New self-employed": comparing European countries and initiatives at EU level

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# Adapting labour law and social security to the needs of the "new self-employed" –

## Comparing European countries and initiatives at EU level

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## Abstract

The emergence of “new self-employment” presents a challenge to political actors both in the individual European countries and at the EU level. The new self-employed are exposed to the same social risks as dependent employees, but they generally enjoy fewer social and labour rights. How are social policy-makers reacting to this situation?

Our response to the question is structured as follows: First, comparing the UK, Germany and the Netherlands, we briefly describe the structure of new self-employment. Second, we outline the initiatives carried out at EU level to adjust legislation in an endeavour to accommodate new self-employment and those types of work that are found at the boundary between dependent employment and self-employment. Third, we delineate the ways in which these types of work are considered under national labour legislation and the extent to which they are taken into account by statutory social security systems.

The main finding that emerges is that because of path dependency, national legislators use very different strategies to adjust social security regulations. Moreover, there is no evidence of a common, EU-wide approach to labour law, despite the EU proposal to follow a “targeted approach” as “best practice”.

## Zusammenfassung

Das zunehmende Auftreten “neuer Selbstständigkeit” stellt die politischen Akteure auf nationaler wie auf europäischer Ebene vor neue Herausforderungen. Diese neuen Selbstständigen sehen sich denselben sozialen Risiken ausgesetzt wie abhängig Beschäftigte, trotzdem genießen sie im Allgemeinen einen geringeren sozial- und arbeitsrechtlichen Schutz. Wie reagieren die sozialpolitischen Akteure auf diese Situation?

Wir werden diese Frage auf dem folgenden Wege beantworten: Zunächst vergleichen wir kurz die Erscheinungsformen und die Struktur der neuen Selbstständigkeit im Vereinigten Königreich, in Deutschland und den Niederlanden. Anschließend stellen wir die Initiativen vor, die auf der EU-Ebene vorangetrieben werden, um der neuen Selbstständigkeit und dem Grenzbereich zwischen

abhängiger und selbstständiger Beschäftigung Rechnung zu tragen. Diesen EU-Initiativen werden im dritten Kapitel die nationalen arbeitsrechtlichen Regulierungen solcher Beschäftigungsformen gegenübergestellt, sowie die Art und Weise, in der die neuen Selbstständigen in die Sozialversicherungssysteme einbezogen werden.

Ausgehend von diesen Analysen kommen wir zu dem Schluss, dass die nationalen Gesetzgeber aufgrund der Pfadabhängigkeit sehr unterschiedliche Strategien verfolgen bei der Anpassung des Arbeits- und Sozialversicherungsrechtes. Darüber hinaus gibt es keine Anzeichen für einen gemeinsamen, EU-weiten Lösungsweg, trotz des von der EU-Kommission als Best Practice vorgeschlagenen „differenzierten Ansatzes“.

## Contents

## Introduction

This contribution deals with the EU-wide emergence of “new self-employment” as a phenomenon that presents certain challenges for social policy actors. The “new self-employed” do not correspond to the traditional profile of the entrepreneur, given that they work on their own account and without employees, often in professions with only low capital requirements. A growing share of these workers can be found in “modern” service-sector branches (such as education, health, and financial and enterprise services), on the one hand, and in the construction industry (via outsourcing and subcontracting), on the other. Such types of work are often located at the boundary between self-employment and dependent employment, but mostly they are formally defined as self-employment.

These “formally” self-employed rely on selling their labour just as the dependent employed do, but they frequently earn both less substantial and less regular incomes than the latter. Moreover, as a rule, they are not subject to labour law but to civil and commercial law and therefore do not enjoy the protection afforded by labour rights. Furthermore, in most European countries they are not protected to the same extent as dependent employees by statutory social security schemes. This means that the new self-employed are exposed to the same or to even more social risks than dependent employees, but at the same time – because of their employment status – they actually have fewer social and labour rights.

The (re-)adjustment of the social security systems and of labour law in order to accommodate the specific risks associated with these new types of work represents a challenge for social policy actors both at national and at EU level. In the following discussion, we will first examine the question as to whether the European Commission, which in recent years has increasingly fulfilled a coordinating role in the field of social policy, is addressing this issue. The other question we investigate is whether and – if so – how social policy actors are responding to the issue at national level. It must be borne in mind that given the disparities that exist between different countries’ labour and social security laws, both the ways in which perceived problems are diagnosed

and the degree of pressure exerted on policy-makers to take action will vary from country to country. We illustrate these variations on the basis of the examples of Germany, the United Kingdom and the Netherlands.

The self-employment rates of these three countries lie in the bottom half of the comparative ranking for Europe. In 2006, more than 12% of all workers in the Netherlands and the UK were self-employed, while the share amounted to around 11 % in Germany (the EU average was 15%; cf. Eurostat 2007, authors' calculations) All three countries have experienced an increase in self-employment in recent decades (Schulze Buschoff 2007). This is notable for the following reasons: The three countries are very dissimilar not only with respect to the structure of their labour markets, but also as regards the regulation of labour market and social policy. The UK can be considered a liberal welfare state with labour markets that are neither highly regulated nor highly coordinated. One would expect "soft" labour legislation and low levels of social insurance. Labour law in Germany, by contrast, is embedded in the corporatist structure of a conservative welfare state. It can be assumed that Germany's labour legislation and social insurance system offer individuals a comparatively high degree of protection against social risks. The Netherlands represents a "welfare mix", in other words, a combination of elements typical for liberal, conservative and social-democratic welfare state regimes. Furthermore, Dutch social policy is well known for its "flexicurity" strategies. As a result, the employment situation of a large share of workers can be expected to be both relatively flexible and at the same time relatively protected.

This country comparison gives rise to the following questions: To what extent do the different welfare state frameworks shape the social and labour rights of the self-employed? Which similarities and differences can be identified in the treatment of the new self-employed under national labour law and in their coverage under statutory social security systems? In which direction are recent reforms of labour and social law leading as they pertain to the self-employed?

In our comparative analysis of the three countries we focus on the legislator (and/or the actors involved in the legislative process) by primarily discussing law reforms that have been implemented over the last decade. In par-

ticular, we wish to give consideration to the influence of the European Union on national policy and to interaction between the EU and the national levels; we believe multi-level governance analysis is an appropriate tool to this end. Summing up, we wish to ascertain whether similar paths are being followed in the different countries in the adjustment of labour law and social security law; if so, this would indicate the long-term prospect of harmonisation of regulations within the EU as regards the protection of the new self-employed under labour and social law.

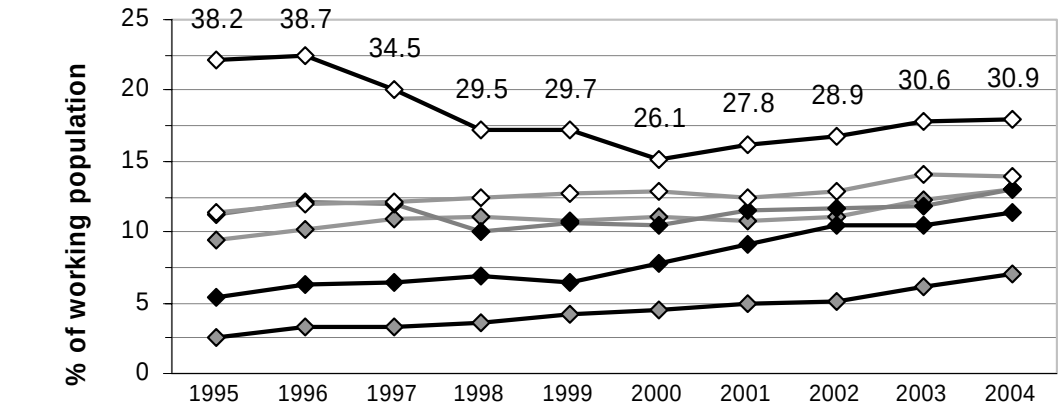
## 1. The emergence of “new self-employment”

The “rebirth” of self-employment is one of the most significant developments to have taken place on contemporary labour markets. Following a constant decline in the share of workers in self-employment in almost all developed countries until well into the second half of the 20th century, the last few decades have brought a return to this type of work.

When developments in the three countries we selected for analysis are compared, some common features emerge. Structural trends such as the growing importance of the service sector, the evolution of contractual arrangements in favour of franchising and outsourcing, and the trend towards smaller enterprise sizes have contributed in all three cases to the self-employment boom. Moreover, each of the three countries has also seen an increase in new self-employment, where the workers concerned do not correspond to the traditional profile of the entrepreneur running a business in the small and medium-sized sector. For instance, the share of women and formerly unemployed is higher among the new self-employed than among the “traditional” self-employed. Another characteristic feature of the structural transformation in the three countries examined is the trend towards own-account self-employment. Since 2003, three quarters of all self-employed in the UK have been own-account self-employed, compared to two thirds in the Netherlands and about one half in Germany (Schulze Buschoff 2004).

A glance at the situation in the various economic sectors reveals substantial differences between the countries but, again, similar trends can also be identified. For example, a much larger share of own-account self-employed is found in the construction sector in the UK than in Germany or the Netherlands. More than a quarter (26%) of all workers in the UK construction industry were own-account self-employed in 2000, compared to only about 5% in Germany and 8% in the Netherlands. The share of own-account self-employed in construction has risen perceptibly in all three countries since then, amounting in 2004 to no less than 31% in the UK, 7% in Germany and 12% in the Netherlands. The shares of own-account self-employed have also risen in the financial, enterprise-related and other service sectors – in the UK from 11% in 1995

to over 13% in 2000 and 14% in 2004, in Germany from 9% in 1995 to 11% in 2000 and 13% in 2004, and in the Netherlands from 11% in 1995 to 10% in 2000 and 13% in 2004.




| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 |
|---|---|---|---|---|---|---|---|---|---|---|
| De - j,k,o | 9.5 | 10.1 | 10.9 | 11.1 | 10.7 | 11.1 | 10.8 | 11.1 | 12.2 | 13.0 |
| De - f | 2.6 | 3.2 | 3.3 | 3.7 | 4.2 | 4.6 | 4.9 | 5.1 | 6.1 | 7.1 |
| Nl -j,k,o | 11.3 | 12.1 | 12.0 | 10.0 | 10.7 | 10.4 | 11.5 | 11.6 | 11.9 | 13.1 |
| Nl - f | 5.3 | 6.3 | 6.5 | 6.9 | 6.5 | 7.8 | 9.1 | 10.4 | 10.4 | 11.4 |
| UK - j,k,o | 11.4 | 11.9 | 12.2 | 12.5 | 12.7 | 12.8 | 12.4 | 12.9 | 14.0 | 13.9 |
| UK - f | 38.2 | 38.7 | 34.5 | 29.5 | 29.7 | 26.1 | 27.8 | 28.9 | 30.6 | 30.9 |

**Figure 1: Trends for own-account self-employment by economic sector**
Share of own-account self-employed in the construction and service sectors as % of the working population.
j, k, o – financial, enterprise-related and other personal services
f – construction industry (NACE Rev. 1)
Source: Eurostat 2006; authors' calculations.

Despite the differences in the total numbers of own-account self-employed, similar trends are evident. The growth of and structural change in the service sector has had a profound influence on the prevalence of new self-employment. Thus, there has been a decline or stagnation in "traditional" service sector branches – such as retail and catering – that were often characterised by self-employment in past decades. At the same time, significant growth in own-account self-employment can be observed in "modern" service sector branches, such as education and health, and financial and enterprise services (Lauxen-Ulbrich and Leicht 2002). These types of new self-employment are often based on the development of "new" occupational profiles, which require personal knowledge and skills. These new types of work often emerge in highly competitive service sectors with low entry barriers and low capital requirements.

Another form of new self-employment is not a consequence of “new” occupational profiles, rather of a change in contractual arrangements in traditional economic sectors such as the construction industry. Work that used to be carried out by dependent employees is increasingly subject to subcontracting, contracting out and franchising and thus becoming the source of the new self-employed.

The development of new self-employment is taking place at the boundary between self-employment and dependent employment. Not only is the profile of a major part of self-employment changing, but so too is that of dependent employment. These two kinds of employment relationship are becoming increasingly similar. Thus, dependent employment is increasingly associated with self-governed and autonomous work organisation (Voss and Pongratz 1998), while some types of work that are classified as self-employment are characterised by a reduction in entrepreneurial freedom as regards the provision of a service or by economic dependence on a single principal (Pernicka et al. 2005). The grey area between self-employment and dependent employment is therefore expanding. In the context of an empirical study on the classification of employment relationships, Burchell et al. (1999) estimated that around 30% of workers in the UK have an ambiguous employment status, that is, they cannot be clearly assigned either to the category of self-employed or to the category of dependent employee. Given that these forms of employment are quite heterogeneous and that the legal and statistical treatment of the workers concerned differs across countries, it is only natural that the numbers involved will also vary. Pedersini (2002) found that about 1% of total employment in the European countries can be generally classified as what is known as “economically dependent work”. That is, though such workers are formally regarded as self-employed, they lack the criterion of economic independence on the market because they are mainly dependent on just one principal for their income.

Differentiating between dependent employment and self-employment often results in a distinction that concerns form more than content. But in most countries a formal distinction between different employment statuses will entail significant consequences with respect to tax payments and, as will be de-

scribed in the following sections, also with respect to social security and labour law.

Before we turn to the question of national regulations, we wish to investigate the extent to which the European Commission, which in recent years has increasingly assumed a coordinating role in the field of social policy, is concerning itself with the issue of social security for the new self-employed and for workers whose employment status lies in the grey area between dependent employment and self-employment.

## 2. EU initiatives

In contrast to initiatives relating to other types of non-standard employment, legislative and political endeavours to promote social protection for the self-employed have been quite weak at the EU level. While EU directives on part-time and fixed-term work have binding effect on national legislators with respect to establishing the principle of equal treatment for part-time and fixed-time workers compared to analogous full-time workers, there is no binding legislation regarding the treatment of self-employed workers or employment relationships located at the boundary between self-employment and dependent employment. There is, however, an EU recommendation regarding this labour market segment that encourages the member states to enhance the minimum standards of health and safety at the workplaces of the self-employed (Council Recommendation 2003/134/EC). Furthermore, the European Commission has stressed that the problem, in particular, of persons posing falsely as self-employed workers in order to circumvent national law (so as to avoid tax obligations or social security contributions) should be dealt with primarily by the individual member states (European Commission 2006b).

Notwithstanding this rather weak degree of political action, there is still an ongoing debate on the appropriateness of Community-level and national-level initiatives to adapt legal frameworks to those types of work, in particular, that fall within the grey area between dependent employment and self-employment. The study Adalberto Perulli carried out for the European Commission on the legal, social and economic characteristics of economically dependent work is quite representative for this debate. The purpose of the study (Perulli 2003) was to provide a comprehensive overview of the situation in the member states and to develop basic recommendations for new initiatives. Perulli suggests that minimum requirements should be introduced into all personal work contracts for services undertaken by the economically dependent self-employed. He recommends that policymakers

> identify the basic social rights applicable to all types of employment, subordinate, independent and quasi-subordinate, and then grade the protection to be provided from minimum to maximum (the latter only applicable to subordinate employment in the strict sense) (Perulli 2003: 116).

He further argues that it should be up to the social partners to elaborate appropriate regulations and to provide a network of appropriate protection (Perulli 2003: 116).

A similar proposal was put forward in the report prepared for the European Commission under the direction of Alain Supiot, which imagined an initial, outermost “circle” of universal social rights, that is, rights guaranteed to all regardless of the type of work performed; a second circle of rights based on non-professional work; a third circle of rights applicable to professional occupations, some of which are already enshrined in Community law (e.g., health and safety); and, finally, a fourth, innermost circle of rights pertaining to subordinate employees (Supiot 2001).

The current European Commission Green Paper on modernising labour law (2006) singles out the legal status of “economically dependent and vulnerable self-employed workers” as a priority topic. This Green Paper argues that the traditional binary distinction between “employees” and “self-employed” is no longer an adequate depiction of the reality of the working world. The emergence of diverse forms of non-standard work has rendered the boundaries between labour law and commercial law less clear. The text points out that some member states have already introduced legislative measures to safeguard the legal status of economically dependent and vulnerable self-employed workers. While these measures are considered to be somewhat tentative and partial, it is stressed that they nevertheless reflect an effort on the part of legislators, the courts and the social partners to tackle these problems.

The added value of the Green Paper consists in drawing attention to the question of social rights for the new self-employed and for persons engaged in work found on the borderline between dependent employment and self-employment, and in re-opening the discussion. It also suggests that policy-makers take into consideration Perulli’s proposal to introduce minimum requirements into all personal contracts for services (Perulli 2003).

The European Commission’s Green Paper offers a diagnosis of the problem and a potential solution (best practice) that each country can use as a benchmark against which to measure its own response. The Commission deals in this Green Paper in particular with the labour law aspects of the issue,

while the concerns regarding social security legislation are left largely undiscussed.

The fact that the Commission has chosen a Green Paper as its means of putting the labour law position of the new and own-account self-employed on the political agenda is particularly noteworthy. One might first suspect that there is a lack of interest representation on behalf of the self-employed at the regulatory levels of the EU. Perhaps the strengthening of the role of the social partners – employers and employees – in the context of the social dialogue has been at the expense of the own-account self-employed? The own-account self-employed are neither employers nor employees and therefore cannot be accommodated by the traditional system of corporatist interest representation through which the interests of employers are represented in employers' associations, on the one hand, and the interests of employees are represented by trade unions, on the other.

However, the above must be qualified by the observation that throughout Europe the trade unions have increasingly been opening their doors to the own-account self-employed since around the end of the 1990s. In all three countries studied here, it is possible for persons belonging to the growing segment of own-account self-employed in the construction industry or in specific areas of the service sector to join a trade union. And as well as organising the self-employed, trade unions also engage in political lobbying by representing the interests of the self-employed in the political dialogue.[1]

It must also be taken into consideration that, in addition to the social partners, a growing number of other actors are involved in political processes at the level of the EU. Cooperative procedures at various levels and between various actors are increasingly taking the place of hierarchical governance in the traditional sense (cf. Benz 2004). The pluralisation of actors and these new forms of governance are priority topics in research on Multi-Level Governance. MLG research examines the transformation of statehood as a con-

[1] The common strategy of the trade unions for recruiting (dependent) self-employed workers in the three countries is to offer specialised services such as insurance, legal advice and assistance in drawing up contracts. The different trade unions have slowly begun to open their doors to workers in non-standardised employment relationships by no longer limiting their activities to traditional trade union instruments (collective bargaining, improvement of working conditions) and instead extending their repertoires so as to also offer services that meet the needs of atypical workers (Boeheim and Muehlberger 2006: 9; Muehlberger 2004).

sequence of the expansion of the arena for political decision-making and the extended sphere of influence of the actors involved. It must increasingly be assumed that there are complex, transnational constellations of actors who influence the definition of a problem and thus also the decisions reached in the policy area concerned. The policy area dealt with here is a good example of this new type of governance. The European Commission itself has used “soft” forms of governance (Green Paper and expert opinions) to place the labour and social security rights of the new self-employed on the political agenda. The publication of the Green Paper was accompanied by an appeal to numerous government and non-government actors to take a stand on statements and questions and to thus participate in the political process of negotiation.

We will return at the end of this contribution to the question as to whether the diagnosis of the problem presented in the European Commission Green Paper and the preferred options for action correspond to those of the government actors in the different European countries. The diagnosis and the potential responses are based first and foremost on the current legal position. We will outline this in the following section for each of the countries studied. First, we will describe how the new self-employed and workers in the grey area between dependent and self-employment are treated by labour law in the different countries. We will focus, in particular, on the most recent legislative reforms in this area. Subsequently and analogously, we will then describe how these groups of workers are treated by their respective country’s social security law.

# 3. Labour law and social security law

## 3.1. Labour law

An individual's employment status is of central importance for his/her social security for it not only determines the applicability of certain labour legislation, such as regulations on occupational safety and health, but also access to insurance against social risks within the framework of statutory insurance systems. In most countries, full labour rights are attached only to the employment status of "employee", that is, standard, dependent, full-time, long-term and mostly male employment. As we will show in Section 5, the same applies to social security entitlements.

The reason for such protection is the general assumption that the employment relationship between employer and employee is highly skewed in favour of the former. Labour law was introduced in order to reduce the contractual freedom of the parties so that the employment contract would no longer be subject to the law of the market and employees would be protected with respect to their relationships with their employers (labour rights) as well as in situations of need (social security) (Perulli 2003: 6). The crucial characteristic of the employee's status as determined by the employment contract, therefore, is subordination. Because, by contrast, the contract between a self-employed worker and his/her principal is regarded as fairly balanced, it is not subject to labour law but to civil and commercial law, so that labour rights do not apply.

The distinction between self-employment and dependent employment has been challenged by the changes that have occurred in the organisation of labour and by the rapid emergence of atypical employment and other ambiguous forms of employment in recent decades, for example, the growing number of own-account workers in the construction industry and the personal and business-related service sector, as described above. There is a danger that workers who cannot be classified unambiguously in one employment status might be excluded from certain social benefits and labour rights (Boeheim and Muehlberger 2006; Burchell et al. 1999). In all three countries examined here,

it is more convenient for a principal if an employee or freelance collaborator is classed under the employment status of “self-employed”, assuming the principal’s only aim is to save on social insurance contributions and curtail labour rights. In the three countries, therefore, the problem of “bogus self-employment” or “economically dependent self-employment” is rife. Bogus self-employment is the deliberate classification of a worker’s employment status as self-employed under civil law, despite the fact that the quality of his or her working situation meets all the criteria that characterise dependent employment. Economically dependent self-employment, on the other hand, usually meets most criteria of self-employment, except that of economic independence. Though the empirical observations are similar in the three countries we studied, they each tackle this issue rather differently.

More recent reforms of **UK** labour law attempted to take account of the intermediate status of “dependent self-employment” by establishing the legal category of “worker” in-between “employee” and “self-employed” (Freedland 2003: 22–26). Under this approach, legislation pertaining, for example, to working time, protection against discrimination of the disabled at the workplace, minimum wage conditions, protection against non-payment and deduction, and also the right to statutory sick pay no longer applies only to dependent employees, rather must be applied to all contractual relationships whereby individuals supply their own labour without running their own business (Freedland 2003).

The Employment Relations Act of 1999 provides for the extension of labour rights to groups of workers who have not benefited from them to date (Boeheim and Muehlberger 2006: 7). While it is true that on the basis of this legal position dependent self-employed are granted more labour rights on principle, the increased consideration given to the concept of “worker” in the legislation still leaves many aspects ambiguous. The distinction between the categories “worker”,“employee” and “self-employed” is made on the basis of a matrix of indicators on the following four dimensions: 1. control over how the work is done and the business is run, 2. integration into the employer’s or the principal’s organisation, 3. the extent to which the employer or principal is required to offer work and the contractor has the right to turn work down (mutuality of obligations) and 4. the extent to which the person concerned must bear

the economic risk (economic reality). For instance, people are likely to be "workers" if they can turn down work and are offered work only when it is available, but otherwise their working situation is mostly like that of employees. (cf. COI, 28.03.07) But as these criteria are rather indistinct, it cannot yet be foreseen which criteria the labour tribunals will ultimately apply in order to draw a distinction between a dependent "worker" and an independent, "self-employed" individual (Boeheim and Muehlberger 2006: 7). However, persons running their own business will still be classified as genuinely self-employed, irrespective of their working situation (COI, 28.03.07), and for the time being only particular freelancers benefit from this legislation.

In **Germany**, dependent forms of employment that are not equivalent to the status of employee are already covered by labour law under the term *arbeitnehmerähnliche Person* ("employee-like person"). Thus, German labour law – like labour law in the UK – provides for another conception of dependency than only that of legal subordination. "Employee-like persons" are considered to be in need of social protection because of their economic dependency on their principal. The term "employee-like person" is actually cited in several Acts. The most detailed and clear-cut definition is contained in the 1969 Collective Agreements Act (*Tarifvertragsgesetz*, TVG). An employee-like person is defined as a person who works under either a business contract or a free contract for services, performing the service or work personally and without employees, and working mainly for one principal (such that more than half of the profits are earned from that one principal) (TVG, § 12a).[2] The economically dependent own-account self-employed thus gain the right to paid holidays (Federal Leave Act, BUrlG), the right to take payment disputes to the labour court (Labour Court Act, ArbGG) and the right to be subject to collective agreements (TVG). In some economic sectors, especially the media sector, freelancers and other own-account self-employed have gained several more labour protection rights in this way.[3]

[2] If the person works as an artist, journalist or writer, the rule of one third of the profits is applied.

[3] Another important aspect is the establishment of legislation on price control in the area of subcontracting (§12 of the Collective Agreements Act). Under this regulation, collective contracts can be negotiated for employee-like freelancers, specifying periods of notice, continued payment of remuneration in the event of illness, and other similar binding rights. To date, such collective contracts have been agreed exclusively in the media sector – first and foremost for public television and radio stations and for daily newspapers (Buchholz 2002: 122).

**Table 1: Changes in labour legislation concerning the grey area of dependent self-employment**

| | United Kingdom | Germany | Netherlands |
|---|---|---|---|
| definition | **worker:**<br>· personally performs any work or service<br>· not running his/her own business<br>· four main categories: control over work, integration into organisation, mutuality of obligations and economic reality | ***arbeitnehmerähnliche Person* (employee-like person):**<br>· works under a business contract or free contract for services<br>· mainly for one principal, from whom more than half of the profits are earned<br>· the work or service is performed personally and mainly without employees | **work contractor:**<br>· legal presumption of employment contract<br>· work carried out for another person for pay on a weekly basis, or for at least 20 hours per month for three consecutive months |
| groups of self-employed affected | some freelancers | economically dependent own-account self-employed working mainly for one principal, excluding sales agents | own-account self-employed working regularly for one principal |
| rights | · minimum wage<br>· working-time regulations / holidays<br>· sick pay<br>· protection against discrimination<br>· protection for part-time workers | · paid holidays (four weeks)<br>· may take disputes to the labour court<br>· collective agreements | · has all the rights of an employee<br>· is subject to compulsory statutory insurance |
| paradigm | gradually extending the scope of labour law by replacing legal subordination with a cluster of indicators for the quality of the relationship between the two parties | gradually extending the scope of labour law by replacing legal subordination with economic dependency | Extending and redefining the scope of the category of employee |

Sources: COI (2007), European Commission (2006b), Perulli (2003), Supiot et al. (1998).

But outside of this sector, many of the own-account self-employed do not claim their rights either because they do not know about them or because of their economic dependency.

The **Dutch** Flexibility and Security Act of 1999 introduced a legal presumption that an employment contract exists when work has been carried out for another person in return for pay on a weekly basis, or for at least 20 hours per month over three consecutive months. Accordingly, all applicable labour rights, labour protection and social insurance obligations then apply to the

person concerned. Despite the acquisition of social security, some self-employed view this law as another source of uncertainty because their employment status can vary from contract to contract (Choi and Schröder 2003: 62).

To sum up, the British change in labour law is closest to the EU proposal of a “targeted approach” (European Commission 2006b). Corresponding to the descending conditions of dependency from wage-earner employment to genuine self-employment, the UK adopted several grades of protection and regulation through the implementation of a new, in-between employment status. But the general delimitation of self-employment remains, because persons running their own business are excluded from the category of “worker” per se. The scope of labour law was thereby broadened without focussing only on the category of ”employees”. The same is true for the German term *arbeiternehmerähnliche Person,* as defined in the Collective Agreements Act. But until now the legislator has not defined a distinct employment status of this kind. The Dutch Flexibility and Security Act broadens the status of dependent employment itself by reclassifying some self-employed as working under an employment contract and therefore redefining the boundaries between the two categories. The notion of legal subordination has been replaced by other criteria describing the regularity and quality of the relationship between the two parties.

### 3.2. Social security law

We have shown above that the self-employed are not, as a rule, subject to labour law but to civil and commercial law, and that therefore their labour rights are limited. Equally, in most countries the self-employed are not eligible for statutory social security schemes to the same extent as dependent employees. But the variations in this respect between the different countries are substantial. The question as to whether and in which manner national social security schemes cover the self-employed will be dealt with in the following Tables 2–4.

## Table 2: Comparison of statutory old-age pension insurance systems

| | Standard coverage | Additional coverage |
|---|---|---|
| **United Kingdom** | | |
| | 1. Basic pension system (almost universal coverage) aiming to prevent poverty in old age.<br>2. Obligatory additional state pension system exclusively for dependent employees; it is possible to "contract out" from this system. | Voluntary private provision; state-regulated forms of "contracting out" for dependent employees. |
| **Germany** | | |
| | Statutory pension insurance for dependent employees; special systems for civil servants and certain groups of self-employed; aim is to maintain same income position in old age. | Voluntary private provision with the possibility of state subsidies (tax relief) for dependent employees (Riester pension) and for self-employed (Rürup pension). |
| **Netherlands** | | |
| | Basic pension system with universal coverage; aim is to provide an adequate standard of living. | Additional company- or branch-specific mandatory pension insurance (covering 90% of all employees); voluntary private provision with the possibility of state subsidies (tax relief) for the self-employed. |

## Table 3: Comparison of statutory health insurance systems

| | Benefits in kind | Cash benefits | Paid maternal leave |
|---|---|---|---|
| **UK** | National Health Service (NHS) provides general medical care for all inhabitants, including the self-employed, tax-financed. | The self-employed are not entitled to cash benefits (because they are provided by the employer), but they are entitled to cash benefits in cases of total inability to work. | Right to paid maternal leave for self-employed women (for a period of 26 weeks, max. GBP 106 [154 euro] weekly). |
| **De*** | Compulsory statutory health insurance (GKV) only for farmers, artists and publicists, contribution-based.<br>Voluntarily continued insurance is possible in cases of previous insurance. | Self-employed insured under the GKV with a standard tariff are entitled to benefits after the 6th week of illness with a replacement rate of 70% of the previous income. | Right to paid maternal leave for self-employed women, who are obligatorily (as for farmers, artists and publicists) or voluntarily insured under the GKV. |
| **NI** | Compulsory social insurance based on residency (thus including all self-employed), contribution-based. | No entitlements for the self-employed. | The right to paid maternal leave for self-employed women was abolished in 2004. |

* German legislators plan to introduce new regulations comprising contribution-based, compulsory statutory health insurance for all citizens – including the self-employed – by 1 January 2009.

**Table 4: Comparison of statutory unemployment insurance systems**

| | Unemployment insurance |
|---|---|
| **UK** | No access for self-employed to the national system. In cases of need, possibility of means-tested benefits. |
| **De** | Since February 2006, the self-employed, subject to certain preconditions, have the possibility of remaining in the unemployment insurance system on a voluntary basis. |
| **Nl** | No access for self-employed to the national system, the relevant Act only applies to dependent employees. |

Sources Tables 2–4: Boden (2005), Bieber (2003), Fachinger and Oelschläger (2000), Devetzi (2003), European Commission (2006a) and Leschke (2006).

In the **United Kingdom**, the British social insurance model, which is based on the Beveridge Plan of 1941, also includes all self-employed on principle. The self-employed are therefore enrolled in and dealt with in the state social security systems in a similar way to dependent employees, except that they are excluded from the additional state earnings-related pension. The self-employed in the UK basically enjoy similar conditions to dependent employees with respect to many social security benefits. The universalistic and tax-financed British National Health Service covers the health care of all residents of the UK, irrespective of their employment status. In the event of a transition between dependent employment and self-employment, there is no need to change health-care system. Differences may arise when it comes to the additional state pension system, which excludes the self-employed, and the way in which income is calculated in means tests. Moreover, in contrast to dependent employees, the risk of unemployment or a lack of contracts is not covered by the UK social security systems.

In addition, the level of state coverage is very low. Only barely 3% of the self-employed (and less than 10% of the dependent employed) in the UK believe that they will find it “easy” or “very easy” to get by on their state retirement pension (Schulze Buschoff 2006). In order to maintain their standard of living, the self-employed – just like dependent employees – are forced to rely on company or private pension plans. Against the background of irregular and low incomes, as described above, and the resulting low capacity for saving, the self-employed face particular problems in this respect.

The **German** social security systems, by contrast, offer individuals a relatively high degree of protection and insurance against social risks. When applied to the self-employed, however, this is only true to a limited extent, or only for certain categories of self-employed. In contrast to the classical "old" self-employed, such as artisans or institutionalised liberal professionals, many of the "new" self-employed, especially own-account workers, generally do not belong to any kind of corporate structure and do not enjoy the welfare-state mitigation of market risks which is typical for the German employment system (Gottschall and Betzelt 2003).

As a result of continuing the Bismarckian tradition, only some groups of self-employed are covered on the basis of special regulations by the solidaristic, pay-as-you-go state system of social security. There are currently mandatory special schemes under the statutory retirement insurance system for around a quarter of the self-employed, for instance, midwives, agriculturists, coastal mariners and coastal fishers. The majority of the self-employed are not subject to any kind of mandatory social insurance, however. There is therefore widespread demand in Germany for the mandatory integration of all self-employed into the social insurance systems (Bieback 2001; Betzelt and Fachinger 2004; Schulze Buschoff 2005).[4]

The problem of the expanding grey area between dependent employment and self-employment became a subject of discussion in Germany mainly in the context of the debate initiated in the 1990s by the trade unions regarding what was termed "bogus self-employment".

The response of Germany's legislators to this growing problem was the "Law on Adjusting Social Insurance and on Guaranteeing Employee Rights" of 19.12.1998 (known as the Adjustment Act). The aim of this law was to define the status of self-employment more precisely in order to counteract the transformation of regular employment relationships into bogus self-employment arrangements. However, only a year later, these regulations were significantly relaxed by the "Law on Promoting Self-Employment" of 20.12.1999 (new regulations introduced in 2000).

[4] A positive step in this direction is the opportunity since February 2006 for all self-employed in Germany who were previously dependent employees to remain in the unemployment insurance system on a voluntary basis.

The German Pension Insurance Federation still carries out a “procedure for the determination of occupational status”, which is intended to verify or clarify a worker’s status under social security law, that is, whether the activity in question constitutes dependent employment or self-employment. However, proving the existence of (bogus) self-employment in the sense of producing legal evidence is likely to be difficult for the German Pension Insurance Federation, and especially so in borderline cases. All in all, the legislation on so-called bogus self-employment appears to be neither consistent nor easily explicable. The legislators’ original aim of implementing a sustainable, restrictive regulation of bogus self-employment was not achieved and is now no longer vigorously pursued (Betzelt 2006: 31). In fact, under new labour market policy schemes to promote self-employment, the responsible bodies no longer even carry out the procedure for the determination of occupational status.

The **Dutch** welfare state can be considered a “welfare mix” of liberal, religious and social-democratic elements. The characteristic feature of developments in recent decades has been a dynamic combination of security, increased flexibility and privatisation. The statutory social security system in the Netherlands normally covers all inhabitants of the country. Thus, the self-employed are covered by the basic old-age pension scheme and in cases of maternity or illness they are entitled to the same benefits in kind as anybody else. In some categories, however, there exist special rules for the self-employed. There is, for example, no longer a statutory insurance scheme for the self-employed that provides cash benefits in cases of maternity or illness. In the past, the self-employed had their own income-based insurance systems, such as occupational disability insurance and the right to paid maternal leave. These state laws for the social security of the self-employed were abolished on 1 August 2004. The Dutch government translated the idea into a public policy that the self-employed should insure themselves more comprehensively on the private market. This decision is in line with a universal trend towards the privatisation of the social security system in the Netherlands.

On the one hand, therefore, social security for the self-employed was reduced in 2004 through the abolition of their own, income-based insurance. On the other, social security had already been extended by the above-mentioned Dutch Flexibility and Security Act of 1999. This act introduced a

legal presumption that an employment contract exists when work has been carried out for another person in return for pay on a weekly basis, or for at least 20 hours per month over three consecutive months. Accordingly, not only all the labour rights but also all the social security obligations of employees then also apply to the worker concerned.

All in all, it emerges that there is little sign of uniform regulations across our three countries, never mind throughout the EU, on social security protection for the new self-employed. Developments in this area will thus remain path dependent in nature and in line with the welfare-state traditions in each of the countries studied, so that national variations are likely to remain both present and substantial for the long term.

## 4. Conclusion: Comparing action at the national and EU levels

With its Green Paper on social rights for the new self-employed and for workers in the grey area between self-employment and dependent employment, the European Commission has placed this issue on the political agenda. Its recommendations only concern the area of labour law, however, and not questions pertaining to the field of social security law.

Social security law is at least as important a means of protecting social rights as is labour law. Our study of three countries has shown that self-employed workers are often either not covered at all by national social security legislation or only at less favourable conditions than dependent employees. The differences between these countries are substantial, however, and can be explained by the relevant welfare state traditions and a strong degree of path dependency in the development of the respective social security systems.

What is needed is convergence between the European countries with the aim of introducing mandatory social security for **all** categories of self-employed and "grey area" employees that would at least guarantee a **basic income as a safeguard against poverty**. Notwithstanding the evident trend towards privatisation, the Dutch model (still) comes closest to achieving this goal. Although all workers enjoy basic coverage in the UK, this cannot be considered a safeguard against poverty. In Germany, only selected groups of self-employed and employees in the grey area between self-employment and dependent employment are covered by the statutory insurance systems. All in all, there is no sign of convergence between the EU countries on social security regulations for the self-employed, and this aim is not being actively pursued either by the European Commission.

In the area of labour law, the situation is different. Here, the European Commission has used a Green Paper to propose a concrete solution in the form of a "best practice" that the member states are invited to use as a benchmark. A "targeted approach" is favoured, which gives "categories of vulnerable workers involved in complex employment relationships […] minimum rights without an extension of the full range of labour law entitlements associated with standard work contracts" (European Commission 2006b: 12). In the

three countries we studied, two different paradigms can be identified for how to deal with the problem of the grey area between dependent employment and self-employment. First, as proposed by the European Commission, the gradual expansion of the scope of application of labour legislation beyond the status of employee and, second, the expansion of the status of employee so as to incorporate more workers who would then become eligible for comprehensive protection under labour law.

The first solution – expansion of the scope of labour legislation beyond the status of employee – has been adopted by Germany and the UK. While this basically corresponds to the approach promoted by the Green Paper, if one looks at its actual implementation in the two countries, then it becomes questionable whether these can be considered models of “best practice”.

The legislative initiative in **the United Kingdom** explicitly excludes those self-employed who run their own businesses from the new category of “worker” and is therefore only applicable to some freelancers. The traditional distinction between forms of dependent employment that require protection and forms of self-employment that do not has therefore been partially maintained, while the Green Paper’s proposal to establish basic protection for **all** people who personally provide services within the context of a relationship characterised by economic dependence was not implemented.

In **Germany**, the economically dependent own-account self-employed enjoy substantial protection under labour law as members of the category of “employee-like person”. However, “employee-like” workers are not recognised as having an independent employment status, rather they are considered an exception to the self-employed who are excluded on principle from the scope of labour law. The term is enshrined in some less recent labour legislation. In latter years, more attention has been paid to the social security aspects of the issue and to bogus self-employment than to labour law.

In the **Netherlands**, the scope of “employee” status was extended in accordance with the second paradigm. All employed persons who are subject to a certain degree of economic dependence are considered employees and enjoy the full protection already accorded to the latter. One consequence of this approach is that the dichotomy between generally unprotected self-

employment and widely protected dependent employment still remains. In addition, the classification as self-employed can vary from contract to contract and in this way can compromise the transparency and reliability of a person's employment status.

The EU Green Paper might have been expected to lead in our three countries to an increased awareness of the issue of social rights for new and/or economically dependent self-employed. But, as the current national responses to the Green Paper show, none of the countries' governments has expressed any need for further action (BMAS 2007; DTI 2007; SZW 2007).

While with its Green Paper on social security rights for the self-employed and for "grey area" workers the European Commission has placed the issue on the political agenda, the reactions of the governments of the three countries we studied show that these neither concur on the basic diagnosis of the problem nor do they necessarily view the "best practice" model of gradual protection of basic rights as a standard to be imitated. Accordingly, the comparison of the reforms carried out in recent years in the three countries does not show any evidence of common goals. It remains to be seen, however, in what way other political actors, such as the trade unions – which were also invited to adopt a position with respect to the Green Paper – will contribute to the discussion.

As we already pointed out, the process of placing the lack of social rights for the new self-employed on the political agenda by means of a Green Paper is a good example of a new type of governance being implemented at EU level. This is characterised by an increase in the number of actors involved, multiple levels of action and an internationalisation of statehood (Multi-Level Governance). The responses of the national governments to the Green Paper only represent one part of the complex network of actors involved. The unions, which increasingly see themselves as representatives of the interests of the new self-employed, could drive the political process forward at both national and EU level in the direction of extended rights for the new self-employed. Moreover, not only is there an increasing number of actors and levels involved, but the modes of governing, or rather governance, are also becoming more variegated. It is possible that in the future the EU will further

supplement the “soft governance” approach of the Green Paper by other types of governance. Despite the not very cooperative attitude of the national governments so far, it remains to be seen, therefore, whether the process initiated by the EU will succeed after all in paving the way for EU-wide binding labour rights for the new self-employed.

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